IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 496

WIEN ALASKA AIRLINES, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY BRIEF OF PETITIONER

Petitioner submits this reply brief addressed to the following arguments first raised by the United States in its Brief in Opposition: (1) that the United States is not liable for non-contractual indemnity in this case because a private employer "under like circumstances"[1] would not be liable; and (2) that *Maddux* v. *Cox*. 8th Cir. No. 18,567, September 6, 1967, supports the Government's argument that the Ninth Circuit was correct in affirming the dismissal of petitioner's third-party complaint.

[1] 28 U.S.C. § 2674.

1. The Government argues in its brief that the United States is not liable to petitioner for non-contractual indemnity in this case because a private employer "under like circumstances" would not be liable. In support of this proposition the Government cites numerous State court cases and early lower federal court decisions holding that exclusivity provisions in State Workmen's Compensation Statutes, and Section 5 of the Longshoremen's and Harbor Workers' Compensation Act,[2] bar third-party claims against employers for contribution or indemnity because their purpose is to provide these employers with "a liability which is limited and determinate." (Brief in Opp. p. 6, footnote 3, p. 8). In reply to this argument and these citations petitioner submits three responses.

First, there is a split of authority—rather than a "general rule," as urged by the Government—on the question of whether exclusivity provisions in workmen's compensation acts provide employers with completely limited liability and a defense to third-party claims for contribution or indemnity. This Court unanimously rejected such a contention, as well as all of the cases cited in the Government's brief, in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963). Professor Larson has stated in his Treatise, "Perhaps the most evenly-balanced controversy in all of compensation law is the question whether a third party in an action by the employee can get contribution or indemnity from the employer, when the employer's negligence has caused or contributed to the injury." 2 LARSON, WORKMEN'S COMPENSATION LAW § 76.10 (1952). See, *e.g.*, *Ryan Stevedoring Co.* v. *Pan-At-*

[2] 33 U.S.C. § 905.

lantic S.S. Corp., 350 U.S. 124 (1955); *The Tampico*, 45 F.Supp 174 (W.D.N.Y. 1942). Virtually all of the cases cited in the Government's brief in this case were presented to this Court in the Government's brief in *Weyerhaeuser*,[3] *supra*, and every effort was made there to persuade this Court to accept the argument that the purpose of Section 7(b) F.E.C.A.[4] is to provide the Government with a "limited and determinate" liability. In its unanimous opinion rejecting this contention this Court did not refer to *one* of the cases relied upon by the Government in its brief.

Second, a common liability of the third-party defendant to the plaintiff is *not* a "prerequisite" to indemnity, and the Ninth Circuit was clearly erroneous in so holding. (Brief in Opp. p. 7, footnote 5). The Government states again and again throughout its brief that this common liability is a prerequisite to liability for indemnity; yet it never answers petitioner's point that there are cases where no such common liability exists, see *Keleket X-Ray Corporation* v. *United States*, 275 F.2d 167 (D.C. Cir. 1960) (Pet. 12), or its argument that mutually exclusive liabilities, rather than a common liability, is the only prerequisite under the law for indemnity. (Pet. 11-13). Its silence can only be interpreted as a tacit admission that it has no answers to these questions.

Third, a private employer "under like circumstances" is an employer whose defense to petitioner's third-party claim is based upon Section 7(b) F.E.C.A.,

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[3] See Brief for the United States in *Weyerhaeuser S.S. Co.* v. *United States*, pp. 12, 13.

[4] 5 U.S.C. (Supp. II) § 8116(c).

and not some State Workmen's Compensation Act more to the Government's liking. It is interesting to note that the Government in its brief has not attempted to uphold Judge Jertberg's "distinction" between claims for contribution in admiralty and those at law, but has chosen instead to argue that the Government is not liable because a "private employer" would not be. Such a tack is an obvious attempt to avoid both the weaknesses of the Ninth Circuit's opinions in this area and this Court's construction of Section 7(b) in *Weyerhaeuser*. However, the Government cannot avoid the effects of *Weyerhaeuser* merely by referring to private employers. 28 U.S.C. § 2674 does not require a litigant to show the presence of identical private activity before it can recover against the United States. See *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955); *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957). The instant case concerns the effect of Section 7(b) F.E.C.A. upon petitioner's third-party claim for indemnity, and no amount of discussion about "private employers" can change that fact. The Ninth Circuit held in this case that petitioner's third-party claim was properly dismissed because, "under the provisions of Section 7(b) the United States is not liable in tort to the legal representatives, spouse, dependents, or next-of-kin of Backlund for damages on account of his death." (App. 25). The reason there is no "underlying liability" here, according to the Ninth Circuit, is *solely* because of the effect of Section 7(b) F.E.C.A. If that holding is contrary to this Court's construction of Section 7(b) in *Weyerhaeuser* it must fall; and State court cases construing State workmen's compensation acts cannot save it.

2. The case of *Maddux* v. *Cox*,[5] decided by the Eighth Circuit after the filing of the petition for certiorari in this case, does not support the Government's contentions that the Ninth Circuit's opinion in the instant case is correct and not in conflict with *Weyerhaeuser*. As noted above, the instant case concerns the effect of Section 7(b) F.E.C.A. upon petitioner's third-party claim for indemnity. *Maddux* v. *Cox* has nothing to do with Section 7(b), with exclusivity provisions in workmen's compensation acts, or any related problem. It holds only that a joint tortfeasor cannot have contribution where the Government cannot be liable *at all* to the plaintiff, a serviceman. It should be noted that in the instant case, as in other workmen's compensation cases, the Government *is* liable to the plaintiff under F.E.C.A. Therefore, the question in such cases is whether indemnity requires a "common liability"—that is, "in the sense of being identical in amount or in the sense of flowing from breach of the same kind of duty." Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law (Tenta. Ed. 1958). This point has been discussed in the petition (pp. 12-13), and will not be repeated here. Suffice it to say, there is nothing in *Maddux* v. *Cox* which changes the fact that the Ninth Circuit's opinion in the instant case is clearly erroneous, is in direct conflict with this Court's decisions in *Weyerhaeuser, supra,* and *Treadwell Construction Co.* v. *United States,* 372 U.S. 772 (1963), and in direct conflict with applicable decisions in the Third Circuit. See *Hart* v. *Simmons,* 223 F.Supp. 109 (E.D.Pa. 1963); *Drake* v. *Tread-*

[5] No. 18,567, September 6, 1967 (8th Cir.)

well Construction Co., United States District Court for the Western District of Pennsylvania, Civil Action No. 14517.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILLIP D. BOSTWICK
910 17th Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner

JAMES J. DELANEY, JR.
LAWRENCE R. SCHNEIDER
Of Counsel

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